(8)

No. 88-6222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SCOTT WAYNE BLYSTONE,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Pennsylvania

REPLY BRIEF FOR THE PETITIONER

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A. Introduction

Respondent's brief advances several arguments for upholding the statutory instruction given to the jury at the sentencing phase of petitioner's trial that "[i]f you find an aggravating circumstance and no mitigating circumstance, it is your duty to return a verdict of death." R. 148.[1] These arguments rest upon shifting premises as to what the instruction means.

Sometimes Respondent suggests that the language of the instruction is imperative only in "syntax," not in substance. (Resp. Br. 17.) This is a variant of a contention made repeatedly in the brief, that the words used in capital sentencing instructions really do not matter because the jury will gloss them according to the outcome that it wants to reach in any event. (*E.g.*, Resp. Br. 19, 23-24, 26, 30-31.) We discuss this contention at pages 3-6, 11-12 *infra*.

Elsewhere Respondent concedes that the mandatory language of the statutory instruction is imperative in substance and "requires a death sentence" under the circumstances it describes (Resp. Br. 16). We discuss in Part B at pages 2-11 *infra* why the instruction—which we agree has this plain meaning—violates the "constitutional mandate of individualized determinations in capital-sentencing proceedings," *Sumner* v. *Shuman*, 483 U.S. 66, 73 (1987).

Still elsewhere, Respondent suggests that the imperative language of the instruction is merely precatory, reinforcing a "minimal level of oversight" of the jury so as to prevent "gut level sentencing" (Resp. Br. 20). Respondent explains that the instruction

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[1] 42 Pa. C.S. § 9711(c)(1) provides that "[b]efore the jury retires to consider the sentencing verdict, the court shall instruct on the following matters: . . . . (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance. . . ."

> encourages the jury to determine any mitigating circumstances, and to weigh them against any aggravating circumstances, most carefully.

(*Ibid.*) Plainly, this is not the sole effect of the instruction. See pages 6-9 *infra*. But even if it were, we show in Part C at pages 11-19 *infra* that by confining the jury within Pennsylvania's crabbed definitions of mitigating circumstances, the instruction unconstitutionally precludes the jury from considering "'*as a mitigating factor*, any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as the basis for a sentence less than death,'" *Eddings* v. *Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

B. Petitioner's Jury Would Not Have Understood That In Deciding The Appropriate Sentence It Was Free To Evaluate The Weight Of The Particular Aggravating Circumstance Found In This Case

Respondent appears to concede that the weight of a particular aggravating circumstance in an individual defendant's case is a factor that the sentencer must always be free to consider in deciding whether death is the appropriate penalty.[2] Respondent suggests, for example, that in certain robbery-murder cases—a "petty theft which turn[s] into murder in a moment's panic" (Resp. Br. 28)—a death sentence might not be appropriate. But Respondent argues that any aspect of a crime which might lead a jury to conclude that death is not appropriate "may be expressed as a mitigating circumstance under the Pennsylvania statute."

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[2] This constitutional requirement is a corollary of the Eighth Amendment command of individualization in capital sentencing because generic aggravating circumstances such as the felony-murder aggravating circumstance found in petitioner's case "in some cases . . . may not be sufficient to render death an appropriate sentence," *Sumner* v. *Shuman*, *supra*, 483 U.S. at 80.

> The weight to be attached to aggravating circumstances arising from the defendant's record or his offense is simply another way of describing whether any mitigating circumstances exist in the defendant's character and the nature of his crime.

(Resp. Br. 12)

This argument is part of a pattern in Respondent's brief to treat the actual words used in capital sentencing instructions as unimportant. Thus, the statutory word "must" is characterized as mere "syntax in the imperative" (Resp. Br. 17), as if it had a wholly formal quality. Despite the precision with which Pennsylvania's statutory instructions frame the capital sentencing decision in terms of specific "aggravating circumstances" on the one hand and "mitigating circumstances" on the other, Respondent asserts that "[a]ggravation and mitigation are simply opposite ends of the same spectrum of conduct" (Resp. Br. 25-26), with the "end result . . . that the jury may always choose life over death by deciding that one or more mitigating circumstances exist, and that any aggravating circumstances do not outweigh the mitigating circumstances" (Resp. Br. 19). The image presented here is of a jury that first decides what sentence it wishes to impose and only then considers how it can manipulate its instructions to achieve the desired result. Similarly, in discussing the qualifying language of the statute's enumerated mitigating circumstances, Respondent says that adjectives of limitation—such as "extreme mental or emotional disturbance," 42 Pa. C.S. § 9711(e)(2)—"permit the jury to find these specific factors whenever it wishes to include them in the ultimate sentencing determination . . . . [I]t is the jury which has the power to determine what is . . . 'extreme' . . . and what is not." (Resp. Br. 30-31). Respondent calls this "flexibility of language." *Id.* at 31 n. 15.

This Court has never treated capital sentencing instructions so lightly. *See, e.g., Andres* v. *United States*, 333 U.S. 740 (1948). To the contrary, in death penalty cases since *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Court has viewed the quality

of sentencing instructions as crucial to the kind of channeled decisionmaking that the Constitution requires. *E.g.*, *Godfrey* v. *Georgia*, 446 U.S. 420 (1980). In *Gregg* the plurality explained the importance of jury instructions:

> The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. See *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 498 (1931); Fed. Rule Civ. Proc. 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

Id. at 192-93 (footnote omitted). Thus, the issues of instructional interpretation that divided the Court in such cases as *Mills* v. *Maryland*, 108 S.Ct. 1860 (1988), and *California* v. *Brown*, 479 U.S. 538 (1987), bespeak the underlying assumption shared by all the Justices that the exact terms of capital sentencing instructions *do* matter.

This Court has repeatedly recognized the importance of the specific language used in jury instructions in every context in which they are given. *See, e.g.*, *Bachellar* v. *Maryland*, 397 U.S. 564 (1970); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979). In *Francis* v. *Franklin*, 471 U.S. 307, 324-25 n. 9 (1985), the Court described the premises on which these many cases rest.

> The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them. Cases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting instruction will not adequately protect a criminal defendant's constitutional rights. E.g., *Bruton* v. *United States*, 391 U.S. 123 (1968); *Jackson* v. *Denno*, 378 U.S. 368 (1964). Absent such extraordinary situations, however, we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions. As Chief Justice Traynor has said: "[W]e must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case." R. Traynor, the Riddle of the Harmless Error 73-74 (1970) (footnote omitted), quoted in *Connecticut* v. *Johnson*, 460 U.S. 73, 85, n. 14 (1983) (opinion of BLACKMUN, J.).

Once care is taken to examine the specific instructions that the jury received at petitioner's trial, it becomes entirely clear that the jury would not have understood that it was free to do what Respondent now tells this Court was a part of the jury's proper sentencing task—to evaluate the weight of the felony-murder aggravating circumstance as a "basis on which to determine whether the death sentence . . . [was] the appropriate sanction in . . . [this] particular case," *Sumner* v. *Shuman*, *supra*, 483 U.S. at 78. Respondent's suggestion that the jurors would have known that they were supposed to treat the lack of aggravation as a "mitigating circumstance" simply flies in the teeth of these instructions.

In the first place, the jury's understanding of what "mitigating circumstances" mean was conditioned by the enumerated mitigating circumstances, which Respondent admits are meant to be "specific examples" (Resp. Br. 29) of mitigation and which were thrice read to the jury (R. 149-150; 153). These were prefaced by the Court's statement: "I am going to read to you everything under the Crimes Code that you might consider as a mitigating circumstance" (R. 148.) The enumerated mitigating circumstances identify factors such as whether the "defendant has no significant criminal history." 42 Pa. C.S. § 9711(e)(1), and whether "[t]he defendant was under the influence of extreme mental or emotional disturbance," 42 Pa. C.S. § 9711(e)(2). When all of the enumerated mitigating circum-

stances are reviewed,[3] it is obvious that a jury hearing them, and treating them as examples of the meaning of mitigation, would conclude that mitigation should be taken in its normal, common-sense meaning, *viz.*, something favorable or extenuating about the defendant or his crime. No jury hearing these examples would consider "mitigating" the mere fact that the murder could have been worse.[4]

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[3] *See, e.g.*, R. 149:

> These are the things you could consider, but I stress to you that you cannot consider them unless there is some evidence that relates to them. One is that the defendant has no significant history of prior criminal convictions. Also, that the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; the defendant acted under extreme duress or acted under the substantial domination of another person; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts; the defendant's participation in the homicidal act was relatively minor; and any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense.

[4] Respondent's suggestion that mitigation would be understood by a jury to include the relative absence of aggravation is belied by Respondent's example of a presumably less aggravated murder, a "petty theft which turned into murder in a moment's panic" (Resp. Br. 28). Respondent apparently agrees that a sentencing jury must be free to give a life sentence in such a case. But it is difficult to imagine a jury conceiving as a "mitigating circumstance" the fact that a robber spontaneously decides to kill his victim when the theft goes bad. The reason death seems inappropriate in Respondent's hypothetical is that it is a run-of-the-mill crime that unfortunately occurs every day in our country. Such a crime might well be thought by a jury to be insufficiently terrible to warrant death. There is nothing however, that is "mitigating" about such a murder. The fact that it is not one of those extreme crimes for which a juror might think the death penalty appropriate cannot linguistically or logically be made to fit within the concept of mitigation.

Second, even if the common meaning of "mitigating" and the examples given in the enumerated circumstances were not enough to convince a conscientious juror that s/he was not at liberty to consider a relative absence of aggravation "mitigating," the mandatory language of the statutory instructions would certainly do so. The instructions distinguish between two mutually exclusive situations and tell the jury what it is to do in each. When the jury finds any aggravating circumstance and one or more mitigating circumstances, it is told that it must weigh aggravation against mitigation. But when the jury finds an aggravating circumstance and *no* mitigating circumstance, it is told simply that its duty is to "return a verdict of death."[5] These instructions would suggest to any reasonable juror that *only if and after a mitigating circumstance has been found* does it become permissible to weigh aggravation; and that when—as in petitioner's case—no mitigating circumstance is found, the jury is forbidden to evaluate the weight of aggravation and to deem it insufficient to warrant death.

Respondent suggests that even if the jury was not free to assess the weight of aggravation, such a restriction would not have mattered in petitioner's case. (Resp. Br. 28-29). We take this to be a species of harmless error argument, to be judged under the standards of *Satterwhite* v. *Texas*, 108 S.Ct. 1792 (1988), and *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985). So judged, it fails conspicuously.

Petitioner concedes that the evidence of mitigation in this record is not strong. (Indeed that is the starting point of petitioner's argument in Part C *infra* concerning the vice of the

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[5] *See, e.g.*, R 148:

> If you find an aggravating circumstance and no mitigating circumstances, it is your duty to return a verdict of death. If you find that there are mitigating circumstances, then you would need to determine whether the aggravating circumstance or aggravating circumstances that you found outweigh the mitigating circumstances; that is, in balancing the two, if the aggravation of this killing outweighed the mitigation, you must return the death penalty.

instructions given at his trial which forbade consideration of mitigation that did not meet certain quantitative standards.) But the jury in petitioner's case apparently did not share Respondent's view that the decision as to penalty was foreordained. After beginning deliberations, the jury asked for reinstruction on mitigation (R. 153), and one juror asked for additional instruction on the eighth provision.[6] (R. 154). The penalty verdict took a substantial amount of time for the jury to reach. This is not a case in which the jury returned a death sentence without difficulty.

And there are reasons why a juror might have questioned the weight of aggravation in this case. Respondent's brief states that petitioner "selected an unsuspecting, tractable victim" (Resp. Br. 28), "a special education student." (Resp. Br. 2). But these circumstances might have seemed less aggravating to the jury than Respondent makes them sound, since there is absolutely no evidence in the record that petitioner knew these characteristics of the victim. Certainly petitioner did not, as Respondent implies, "select" the victim on such a basis. Again, Respondent's brief emphasizes petitioner's purported enjoyment of the killing, as recounted to a police informant three months after the crime. (Resp. Br. 28) But the jury could have found in this recounting an element of inflation designed to impress the informant. Such braggadocio about murder obviously would not cast petitioner in a positive light, but neither would the jury necessarily take it at face value in assessing the quality of aggravation attending the crime.

In all, the question whether petitioner's crime was sufficiently aggravated to call for the death penalty might have been resolved either way by his jury if the jurors had been permitted to address it. For this reason, instructions foreclosing the jury's consideration of that question altogether cannot be found harmless beyond a reasonable doubt.

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[6] "(8) any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense."

C. Petitioner's Jury Would Not Have Understood That It Was Free To Consider All Degrees Of Mitigation In Deciding On Petitioner's Sentence

Petitioner pointed out in his brief that the enumerated mitigating circumstances defined by Pennsylvania's statute and charged to his jury contain numerous terms of limitation; for example, enumerated mitigation is limited to "*extreme* mental or emotional disturbance." 42 Pa. C.S. § 9711(e)(2); see R. 149, 153. Combined with the instruction that the jury must return a death sentence if it finds an aggravating circumstance and finds no mitigating circumstances, these limitations foreclose the jury's consideration of "nonstatutory mitigating circumstances," *Hitchcock* v. *Dugger*, 481 U.S. 393, 399 (1987). Respondent's brief answers that the restrictions can be evaded by the sentencing jury in various ways.

Respondent first argues that all degrees of mitigation can be considered under the enumerated mitigating circumstances because "it is the jury which has the power to determine what is 'substantial'—or 'significant,' or 'extreme,' or 'relatively minor' —and what is not." (Resp. Br. 30-31.) If the jury is inclined to rely on mitigating evidence in the sentencing decision, it can find such evidence to be "extreme" (or within whatever other limitation of degree applies) "whenever it wishes." (Resp. Br. 30.)

This is another instance of Respondent's general tendency to disparage the effect of jury instructions. (See pages 3-6 *supra*.) Respondent assumes that the sentencing jury will first decide what evidence it wants to consider and then make any factual finding necessary to bring the evidence within the terms of the court's sentencing instructions. But a conscientious jury will follow the court's instructions and will, for example, not consider "mental disturbance," "emotional disturbance" or duress" unless the evidence shows them to be "extreme." If juries cannot be expected to function in this manner, it is difficult to imagine why we require them to swear to follow their instructions, *see, e.g.*, *Wainwright* v. *Witt*, 469 U.S. 412 (1985), and

why judges invest the countless hours that they do in deciding such issues as whether juries should be charged that negligence or recklessness is the proper standard of liability for specific torts or crimes.

Respondent's second argument is that even if certain relevant mitigating evidence is excluded by the restrictions embodied in the first seven enumerated mitigating circumstances, the jury can consider such evidence under mitigating circumstance number eight:

> Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(42 Pa. C.S. §9711(e)(8)). (See Resp. Br. 31-34). But this approach would make nonsense out of every one of the elaborately delineated qualifications of enumerated mitigating circumstances (1) through (7). (See footnote 3 *supra*.) No reasonable juror would suppose that the Legislature and the judge had required him or her to determine whether emotional disturbance was "extreme" for the purpose of including or excluding it as mitigation under enumerated mitigating circumstance number (2), only to turn around and say that *non*-extreme emotional disturbance was to be considered mitigating anyway under circumstance number (8).

Respondent typographically emphasizes the word "any" in the phrase "*any* other evidence of mitigation" in circumstances (8). (Resp. Br. 31). But Respondent does not tell us why the emphasis does not extend to the word "other" or what a juror is to make of that word. How could evidence of emotional disturbance that had just been considered and rejected under circumstance (2) be considered "*any other* evidence of mitigation" under circumstance (8)? Obviously the very same facts already evaluated under circumstance (2) could not be considered "any other evidence" within circumstance (8).

Indeed, Respondent's argument about the scope of circumstance (8) is completely undermined by the accurate description that Respondent gives of the first seven enumerated mitigating circumstances. At several points Respondent calls these circumstances "examples" (Resp. Br. 12, 13) or "non-exclusive statutory examples" (Resp. Br. 19) or "specific examples" (Resp. Br. 29). Petitioner agrees that the seven specific mitigating circumstances are examples of the general category of mitigation, and that the jury will understand them as such. But then it inescapably follows that if a particular fact—non-extreme emotional disturbance or non-extreme mental disturbance—is excluded by the "example," it is not the sort of fact that can be considered at all in mitigation.

Respondent's final argument as to why these terms of limitation do not matter is that the defendant needs not utilize the first seven enumerated mitigating circumstances, but may simply rely on circumstance (8) or submit the mitigating evidence "with no labels at all" (Resp. Br. 32). This is more cynicism about jury instructions, in the same vein that we have noted at pages 3-6 and 11-12 *supra*. Instructions tell juries what to do with evidence. Whether or not a defendant puts "labels" on evidence, the trial judge's instructions define the issues that the jury is to resolve through the use of that evidence. Here the trial judge read the entire list of enumerated mitigating circumstances to the jury no less than three times. (R. 149-50; 153). The list was replete with elaborate definitions of specific mitigating factors and with adjectives of degree. Respondent's suggestion that a jury will ignore all this and give unstructured consideration to any mitigating evidence that a defendant presents "on his own terms" (Resp. Br. 34) is bizarre.

Contrary to Respondent's submissions (Resp. Br. 32-33 & nn. 16 & 17), there was some mitigating evidence of record that was excluded by the instructions' restrictions on mitigation. Respondent says that "there was no evidence in the record that petitioner actually was intoxicated, or even that he had anything to drink." (*Id.* at 32-33 n. 16) The relevant testimony of Jacqueline Guthrie was as follows:

> Q Did you go to any parties that night?

A No.

Q You weren't drinking that night?

A Scott brought a fifth of whiskey.

Q Were you drinking?

A Yes.

Q How much did you have to drink?

A I had maybe two drinks.

(R. 24-B) The jury would have been entitled to find that the "you" who were drinking referred to both petitioner and the witness.

Petitioner agrees with Respondent that this testimony does not establish "intoxication." But that very point illustrates why the instructional limitations on mitigation are significant. A capital defendant who could prove that he was severely enough intoxicated would apparently be entitled to consideration of his intoxication under both enumerated mitigating circumstances (2) and (3). See *Commonwealth* v. *Buehl*, 510 Pa. 363, 508 A.2d 1167 (1986) (evidence of drug use at the time of the offense is admissible to prove circumstances (2) and (3)). A defendant, however, who had been drinking only moderately would not come within these enumerated mitigating circumstances. Thus, the jury would be completely precluded from considering whatever degree of impairment or emotional disturbance the defendant's drinking had caused. Mitigation of this degree could not be cumulated with other kinds of mitigation in the defendant's favor;[7] and if no single mitigating factor met the

[7] At pages 3 and 30-31 of petitioner's brief, we have summarized the evidence suggesting that petitioner experienced a measure of ambivalence about the killing and might not have pulled the trigger if his confederates had protested. At Resp. Br. 33 n. 17, Respondent argues contrary inferences from the same evidence. A jury could have interpreted the evidence either way. While not strong enough to establish the enumerated mitigating circumstance that "[t]he defendant . . . acted under the substantial domination of another person" (42 Pa. C.S. § 9711 (e)(5); see R. 149 153), the evidence was worthy of consideration. As *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), and *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), teach, evidence needs not compel a finding in mitigation in order to deserve a capital sentencer's consideration.

quantitative standards of the enumerated mitigating circumstances, the jury would also be precluded from evaluating the weight of any aggravating circumstance if found (see Part B *supra*), and would be required to impose a death sentence.

Respondent's final argument in defense of the limitations of the enumerated mitigating circumstances is that even if they do restrict what a capital defendant can urge in mitigation, such a restriction does not violate the Constitution.

> The Eighth Amendment does not command the states to indulge every possible theory of mitigation which a capital defendant may devise.

(Resp. Br. 34-35).

What Respondent is apparently arguing is that the Eighth Amendment allows a State to limit the effect of mitigating evidence to certain theories to preclude its consideration beyond the confines of those specific theories. Even if this were an accurate analysis of the operation of the Pennsylvania Statutory instructions—which, as we shall see in a moment, it is not—the Respondent's submission conflicts radically with the rule of *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978), that a capital sentencer must be allowed to give "*independent* mitigating weight to aspects of the defendant's character and record and the circumstances of the offense . . ." (emphasis added). To be sure, the States can forbid the consideration of such matters as "mere sympathy," *California* v. *Brown*, 479 U.S. 538 (1987), and "residual doubt," *Franklin* v. *Lynaugh*, 108 S.Ct. 2320 (1988); but that is because "mere sympathy" and "residual doubt" have nothing to do with a defendant's character or record or the circumstances of the offense that bear rationally

upon the defendant's individual culpability. See 479 U.S. at 541-42 and 108 S.Ct. at 2327 (plurality opinion), 2334-35 (O'Connor, J., concurring in the judgment). In direct contrast, when the "theory of mitigation" that the State seeks to exclude comes within the ambit of relevant mitigation defined by *Lockett*, this Court has struck down such attempted exclusions. See *Skipper* v. *South Carolina*, 476 U.S. 1 (1986) (evidence of good behavior to show future adaptability to prison life could not be excluded); *Penry* v. *Lynaugh*, 109 S.Ct. 2934 (1989) (instructions to jury did not allow full consideration of evidence of mental retardation and childhood abuse).

Respondent does not explain what "theory of mitigation" the State is seeking to exclude by restricting consideration of mental or emotional disturbance or duress to that which is "extreme," by restricting consideration of the influence of other actors to the "substantial domination of another person," and so forth. But degrees of mental and emotional disturbance or duress that are less than extreme and kinds of influences of other persons that do not take the form of substantial domination are all relevant under *Lockett*. The sentencer must be permitted to consider these sorts of factors in full.

In any event, the effect of Pennsylvania's restrictions on mitigating circumstances is not, as Respondent suggests, to exclude only certain "theories" of mitigation. The effect of the statutory instructions is to exclude the evidence of mitigation itself from consideration by the sentencer. To use the most dramatic example,[8] evidence of mental or emotional disturbance that is real but not "extreme" may not be considered at all under enumerated circumstance (2). If the defendant's only evidence of mental or emotional disturbance fails to meet this particular quantitative test, it must be put totally out of account in deciding whether the defendant deserves to die. It

[8] This example is germane to petitioner's case because evidence of alcohol consumption is admissible to prove circumstance (2). See pages 15-16 *supra*.

cannot serve even to offset aggravation that is not extreme; for, unless an enumerated mitigating circumstance is found, the jury is forbidden to consider the comparative weight of the aggravation. Thus an entire stratum of mental and emotional disturbance is excluded from consideration for all purposes and under all conditions. Whatever discretion the States may have in prescribing the weight and manner of considering mitigating evidence, there is no doubt that the Eighth Amendment "condemn[s] any procedure in which such evidence has no weight at all." *Penry* v. *Lynaugh*, *supra*, 109 S.Ct. at 2967 (Scalia, J. dissenting) (quoting *Barclay* v. *Florida*, 463 U.S. 939, 961 n. 2 (1983) (Stevens J., concurring)).

In *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), the defendant was permitted to and did introduce a wide range of mitigating evidence. Nevertheless, a unanimous Court reversed his death sentence because the advisory jury was instructed to consider only the seven statutorily enumerated mitigating circumstances and the sentencing judge apparently understood himself to be similarly prohibited from considering mitigation outside of those categories. The Pennsylvania instructions similarly forbid consideration of mitigating evidence relevant to, but failing to satisfy the restrictions in, seven statutorily defined circumstances. The addition of an eighth circumstance consisting of "any other" evidence of mitigation does not cure the problem because a juror would not expect to reconsider under that provision evidence which s/he had just found insufficient to come within the specific limitations of one of the preceding seven circumstances.

D. Respondent's Lodging Provides Independent Evidence That Pennsylvania Jurors Refuse To Be Straight-Jacketed By The Commonwealth's Rigid Capital Sentencing Process

At the outset counsel for the petitioner offer their apology to the Court as well as to Respondent for the error in the statistical data originally offered to prove the existence of jury nullification. Respondent's Lodging of the relevant "Review Forms" leaves no doubt that the computer-generated sheet

entitled "life only, 1 aggravating and 0 mitigating" obtained by petitioner from the Administrative Office of Pennsylvania Courts (AOPC), did not as requested reflect instances in which the jury found an aggravating circumstance and no mitigating circumstance but failed to impose a sentence of death. Rather, these appear to be instances in which the prosecuting attorney sought, but the jury refused to make, findings of an aggravating circumstance. Petitioner greatly regrets the inconvenience to the Court and to opposing counsel caused by this error.

Unfortunately, while the AOPC will respond to inquiries from the public, it does not allow the public direct access to either its computer or its underlying data. Thus, petitioner, whose counsel did not know the precise way in which the AOPC complies data, was not in a position to ask for the retrieval of information generated by particular entries on AOPC's forms. What petitioner requested was all instances in which the jury imposed a life sentence notwithstanding its determination that there was at least one aggravating and no mitigating circumstance present. That request produced the AOPC's response entitled "life only, 1 aggravating and 0 mitigating," which counsel reported in due course to the Court. Regardless of whether petitioner's request was confusingly worded or simply misunderstood by AOPC personnel, petitioner's counsel again apologizes for the time that Respondent and the Court have spent with the data.

The issue of jury nullification, however, remains. Indeed, Respondent's own Lodging proves the existence of that problem, which is characteristic of overly rigid capital sentencing schemes. The Pennsylvania scheme purports inflexibly to require a sentence of death whenever the jury finds the existence of one aggravating circumstance and no mitigating circumstance. From Respondent's Lodging, it is obvious that some juries, in order to avoid this mechanical straightjacket, simply refuse to make a finding of aggravation notwithstanding its indisputable presence.

That a refusal to find aggravating circumstances in the face of clear evidence is occurring in at least some of these cases is

suggested by the preponderance of Pennsylvania's felony-murder aggravating circumstance[9] as the one presented to the jury at the sentencing hearing but which it refuses to find. (Seventeen of thirty-six cases in Respondent's Lodging fit this pattern). It is unlikely that in most cases there could be any factual dispute about this aggravating circumstance that would not have been resolved at the trial on guilt and innocence.

Unfortunately, however, the only way to show that any particular jury did in fact decline to find an aggravating circumstance despite clear evidence of the circumstance would be by examining the notes of testimony in the record of each case. Petitioner has been able to locate the notes of testimony in only a few of the cases included in Respondent's Lodging. In two of these, the evidence of the existence of the aggravating circumstance was incontrovertible, and the jury's refusal to find it—as Respondent reports (Resp. Br. 37)—could only reflect the "arbitrary and capricious exercise of . . . power" that *Woodson* v. *North Carolina*, 428 U.S. 280, 303 (1976), teaches us to expect from a statute which makes "jurors' power to avoid the death penalty dependent on their willingness to . . . disregard the trial judge's instructions," *Roberts* v. *Louisiana*, 428 U.S. 325, 335 (1976).

According to the AOPC Review Form supplied by Respondent at 80L-82L concerning the trial and sentence of Richard Mitchum, the prosecutor sought the death sentence based on the aggravating circumstance that the "victim was another public servant killed in performance of duty" (at 81L). Indeed Mitchum shot and killed a Philadelphia Housing Authority security guard who was at the time both on duty and in uniform (vol. IX, p. 15, at 3 PL).[10] Thereafter Mitchum fled with the

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[9] 42 Pa. C.S. § 9711(d)(6): "The defendant committed a killing while in the perpetration of a felony."

[10] All citations are to case records which are bound separately and lodged in this Court along with Petitioner's Reply Brief and shall be designated "PL".

guard's pistol (vol. IX, p. 16, at 4 PL). At the sentencing stage, defense counsel offered no evidence in mitigation but asked the jurors to give his client mercy (vol. XIII, p. 28, at 35-36 PL). Even though the AOPC Review Form specifies only a sole aggravating circumstance, in fact the district attorney urged the jury to impose death on the following grounds: (1) that the victim had been "a peace office who was killed in the performance of his duties" (vol. XIII, p. 33, at 40-41 PL); (2) that the killing occurred in the course of a robbery (vol. XIII, p. 34, at 41 PL); (3) that the defendant placed other people at risk by his conduct (*Ibid.*); and (4) that the defendant had a significant history of prior criminal conduct (vol. XIII. p. 25, at 42 PL).

The jury returned a life sentence. Putting aside the evidence concerning the last three aggravating circumstances urged by the prosecutor, the evidence concerning the victim's peace officer status at the time of his murder was both incontrovertible and uncontroverted. Yet the jury, presented with no evidence in mitigation, refused to return a death sentence as required by the Pennsylvania statute.

Again, according to Respondent's Lodging, the district attorney in Nathan Long's case (61L-63L) sought a death sentence on the ground that the "victim was a peach officer killed in the performance of duty." (at 62L.) There was no doubt and no dispute about the status of Long's victim. Indeed at Long's arraignment, which occurred on July 3, 1986, the Commonwealth stated for the record that there had been a stipulation "that the deceased in this case was one police officer Daniel Gleason, at the time of his death, a thirty-eight year old white male assigned to the 25th Police District" (p. 3, at 58 PL).

Apparently on June 5, 1986, Long undertook to rid his neighborhood of the prostitute trade. Having first threatened two prostitutes with bodily harm, he went on to batter the car of an individual who was in the process, Long believed, of picking up a prostitute. Officer Gleason and his partner, Officer Venable, responded to a request for assistance as a result of Long's actions. Officer Gleason approached Long, who shot the

officer at point blank range. Notwithstanding Long's testimony that he shot in self-defense, the jury returned guilty verdicts on the following charges: possessing an instrument of crime, carrying a firearm without a license, and murder in the first degree. It did so after a closing argument by the district attorney that Officer Gleason "was a target because he stood for one thing: he stood for authority" (p. 608, at 114 PL).

At the sentencing stage, the district attorney offered evidence of Gleason's officer status through the testimony of his superior officers (p. 668, at 135 PL), as well as requesting that the testimony of the witnesses who were close to the shooting be incorporated at the sentencing phase (p. 673, at 140 PL). Defense counsel submitted no further evidence at this stage. He did, however, argue that the jury should consider his client's relatively crime free history.

The Court, in charging the jury, stated:

> the Crime Code provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.
>
> * * *
>
> Also, for the purpose of this case, the Commonwealth has relied on the aggravating circumstance that the victim was a peace officer or public servant concerned in official detention who was killed in the performance of his duties.

(pp. 696-97, at 163-64 PL.) Shortly thereafter one of the jurors asked the judge to define what was meant by the defendant acting under the influence of extreme mental or emotional disturbance. (p. 701, at 168 PL.) The judge responded that the statute gave no definition. (p. 702, at 169 PL.) Subsequently, the jury foreman informed the court, "We are hopefully [sic] deadlocked and we cannot come to a unanimous decision" (p. 705, at 172 PL). At this point the court imposed a life sentence. Given the clarity of the evidence concerning the victim's status,

it is hard to understand the jury's deadlock as anything but a refusal on the part of some jurors to comply with the dictates of the statutory instructions.

Clearly, if in *Mitchum* and *Long* the aggravating circumstance was not "proven" (Respondent's Lodging at ii), this was only because the sentencing jury expressed its sense of the inappropriateness of the death penalty despite an absence of mitigating circumstances by refusing to make the evidentially required finding of aggravation. *Mitchum* and *Long* exemplify the phenomenon that petitioner described in his opening brief, that if a rigid sentencing structure does not allow juries to express their reasoned moral judgment as to the appropriate sentence, some juries will flout their instructions.

Petitioner cannot assert how many of the thirty-six cases in Respondent's Lodging represent such jury nullification. Counsel for petitioner has not been able to obtain the notes of testimony in most of these cases. Perhaps there are some cases in which there was a good faith dispute about the aggravating circumstance. That this could be true in most cases—particularly felony-murder cases—seems unlikely, however.

It is also possible that the AOPC form upon which Respondent relies in its Lodging is incorrect in reporting "no aggravating circumstance proven" (Lodging at i-iii). Given the structure of the Pennsylvania verdict form, a copy of which is provided by Respondent at 73L, it is often not possible to determine the basis for a life sentence. The jurors are first asked to render their sentence, and only if the jury imposes death is it required to answer questions concerning aggravation and mitigation. Jurors who decide to spare the life of the defendant need not place their view of the evidence on the record. There is thus "no way . . . for the judiciary to check [a jury's] arbitrary and capricious exercise of . . . [the nullification] power through a review of death sentence." *Woodson* v. *North Carolina*, *supra*, 428 U.S. at 303.

E. All Of The Restrictions In The Statutory Instructions Operate To Prevent The Sentencing Jury From Expressing Its Reasoned Moral Response To The Evidence In Determining The Appropriateness Of A Death Sentence

Respondent complains at various points that petitioner "attempts to snift ground away from" the question upon which this Court granted certiorari. (Resp. Br. 14; see also *id.* at 20-21 n. 7 and 24-25, n. 10). That is not so. The question presented by the petition for certiorari was and remains whether "the mandatory nature of the Pennsylvania Death Penalty statute . . . improperly limits the full discretion the sentencer must have in deciding the appropriate penalty." Petition, p. 2.

None of the arguments in petitioner's brief have strayed from this question. The instructions challenged by petitioner were required by the Pennsylvania Statute and tracked its language precisely. Respondent does not argue otherwise.[11] Petitioner has shown that the statutory instructions prevent a Pennsyl-

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[11] Respondent also suggests that the question presented to this Court was limited to a facial challenge to the Pennsylvania statute. (Resp. Br. 24, n. 10). Actually, the question presented was phrased in the disjunctive so as to apply as well to petitioner's particular case. In any event, the distinction between an as-applied challenge and a facial challenge is not important in the context of this case. Petitioner challenges statutory provisions that instruct the jury how to decide the sentencing issue. Those statutory provisions were read to his jury, and both petitioner and Respondent agree that the jury instructions "were in complete accord with the statute." (Resp. Br. 21). The Pennsylvania Supreme Court has not approved any instructions to a sentencing jury that go beyond the terms of the statute except in contexts not relevant to this case. See, *e.g.*, *Commonwealth* v. *Crawley*, 514 Pa. 539, 526 A.2d 334 (1987) (instruction defining the word "torture" required); *Commonwealth* v. *Buehl*, 510 Pa. 363, 508 A.2d 1167 (1986), *cert. denied* 109 S.Ct. 187 (1988) (approving an instruction limiting the "age of the defendant" enumerated mitigating circumstance to "youth or advanced age").

vania sentencing jury from evaluating the sufficiency of aggravating circumstances to make a death sentence appropriate in cases in which no mitigating circumstances are found. Petitioner has shown that the statutory instructions defining mitigating and aggravating circumstances prevent the sentencing jury from considering mitigating evidence that is relevant to, but insufficient to prove, the specified mitigating circumstances. The "must" language in the statute enforces these restrictions. Indeed, even Respondent says that the point of the "must" instruction is to

> encourage[] the jury to determine any mitigating circumstances, and weigh them against any aggravating circumstances, most carefully.

(Resp. Br. 20)

Essentially, Pennsylvania has erected a rigid capital sentencing structure that precludes its juries from lawfully making "a reasonable *moral* response to the defendant's background, character and crime" *Penry* v. *Lynaugh*, 109 S.Ct. 2934, 2947 (1989) (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (concurring opinion)). Pennsylvania includes among its aggravating circumstances situations in which defendant's moral culpability varies widely—such as murder "in the perpetration of a felony"—but does not allow the jury to assess the extent of the aggravation in the particular case unless an enumerated mitigating circumstance is found. The seven specific enumerated mitigating circumstances in turn are limited so as to exclude plainly relevant mitigating evidence; and the "catch-all" eighth mitigating circumstance permits consideration only of "other" mitigating evidence—a restriction that a reasonable juror would understand to exclude mitigation which is barred by the explicit limitations of the preceding seven mitigating circumstances. All of these limitations are enforced by an instruction that the sentence *must* be death if one aggravating circumstance and no mitigating circumstance is found. Thus, ineluctably, a jury may be driven to sentence a defendant to death despite doubts about the appropriateness of the sentence that it is unable to express through the structures of this mechanistic process.

Respectfully submitted,

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